ISSN 2950-6794 VOL. 1 NO. 2 (SPL. ED)AUGUST 2022

KC

THE KING'S COUNSEL

MAGAZINE

LEWIS HUNTE QC

SPECIAL EDITION

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On his Memoirs

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On the History of the Laws of England

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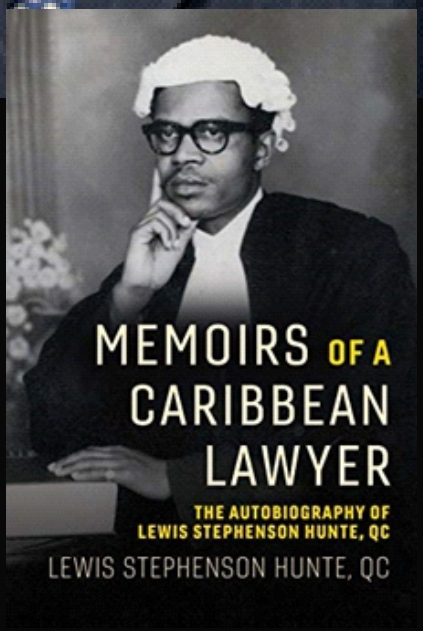

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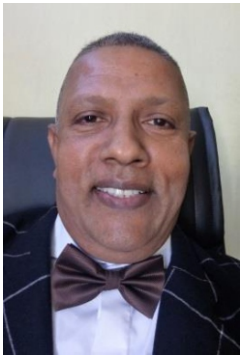

EDITORIAL

Advocacy is a specialist skill that cannot be acquired overnight, it is by large measure used by legal practitioners to present an argument to a Court with a view to persuading a jury and a judge to reach a decision that is favorable to clients. This cannot be worked out so easily when it comes to a complex legal issue. A careful marshaling of the facts and law and the art of presentation is a key to any legal practitioner. We feature in this Special Edition **Lewis Stephenson Hunte QC** *a Senior QC from the Caribbean. He has shared his legal skills and have quoted an interesting piece of Cross Examination.*

Prof. Sir John H. Baker QC, LLD, FBA *has provided a detailed exposition on the History of the Laws of England. He had the privilege of being the Editor of the Oxford History of the Laws of England which covers the entire gamut of the genesis of English law and society.*

Eben Van Tonder *is a South African freelance journalist who has done an interesting research on Lord De Villiers, a former Chief Justice of South Africa. He has chronicled some narratives of Lord De Villiers. Justice De Villiers had done an in-person inspection on a matter that had come before the Supreme Court of South Africa. There is not much literature on the work of former Justices of the South African Supreme Court. An area which needs further research by the South African law academics.*

Attorney Michael Osborne *is a Canadian expert in competition law. He defends clients in private proceedings under the Competition Act, including price fixing class actions. Michael acts for and advises parties in a wide range of commercial disputes, including contractual disputes, shareholders' disputes, commercial fraud, and employment matters. He has expressed his opinion on the Canadian Competition Law.*

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KC
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CITATION
KC - The Kg's Cnsl Vol.1, No. 2. August 2022
ISSN 2950-6794

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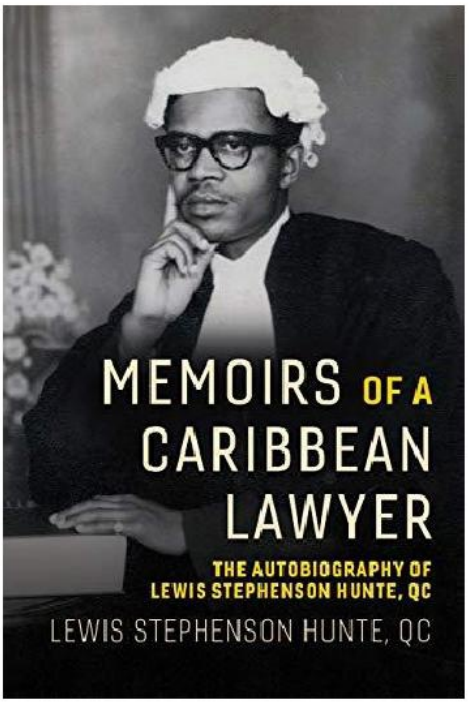
INTERVIEW – LEWIS STEPHENSON HUNTE QC



Lewis S. Hunte, QC, is Head of Chambers and the founding partner of Hunte & Co. Law Chambers. Mr. Hunte brings to the firm an extraordinary career in public service throughout the British Caribbean. In 1982, he was invited to the British Virgin Islands to take up the post of Attorney General. Immediately prior to becoming Attorney General of the British Virgin Islands (1982-85), he served as Deputy Chief Parliamentary Counsel (Barbados); a position he held for seven years. During that period, he occasionally acted as Chief Parliamentary Counsel and also served a one-year attachment to the Federal Department of Justice in Ottawa, Canada. Earlier in his career, Mr. Hunte served as Deputy Registrar of the Supreme Court of Barbados and Deputy Registrar of the Court of Appeal in Jamaica. **It was after that period** in Jamaica, that he was invited to return to Barbados to take up the post of Magistrate.

Among his other contributions to the legal field, Mr. Hunte drafted the 1982 Intellectual Property Legislation of Barbados and the Model Insurance Legislation for the Caribbean Community and Common Market (CARICOM), which comprises the independent countries of the Caribbean. Most notably, when Mr. Hunte was Attorney General of the British Virgin Islands, he, personally, drafted the 1984 International Business Companies Act (IBC Act) of the British Virgin Islands. The first piece of legislation of its kind, the IBC Act has served as a blueprint for statutes adopted in many offshore jurisdictions and was the forerunner of the 2004 BVI Business Companies Act. Known for his passion, patience, and candour in his service to the public, Mr. Hunte brings this same combination of qualities to the private practice of law. He is committed to treating all clients with prompt and personal attention, as well as to handling their matters with the utmost skill and thorough preparation.

A native of Barbados, Mr. Hunte has lived in the BVI since 1982. He was honoured by appointment as one of Her Majesty's Counsel for the BVI in 2003. Mr. Hunte has been called upon to act as Judge of the High Court of the Eastern Caribbean Supreme Court. He is a Notary Public and a Commissioner for oaths.

Bar Admissions, Anguilla, 2004 , British Virgin Islands, 1985, Barbados, 1967, England and Wales (inactive) 1965, Publications, *Memoirs of a Caribbean Lawyer: The Autobiography of Lewis Stephenson Hunte, QC*(2018), *Status Report on the Intellectual Property Laws of the Commonwealth Caribbean*(1982), *Industrial Property Laws of Barbados*(WIPO, 1981), *An Elucidation of the Intellectual Property Laws of Barbados*.. Community Involvement, Rotary Club of Tortola: Past President, Member, BVI Red Cross: Board Chairman (2013 – 2017), Member

KC - The King's Counsel Magazine: Mr Lewis Hunte QC, we are pleased to have a conversation with you on your Memoirs. We gather from your book you have had a very long legal career and have held very responsible positions. You have had the privilege of being the Attorney General of the British Virgin Islands and have held a judicial appointment in Barbados. We would like to hear about your career and why did you decide to become a lawyer. What drove you towards attaining that achievement?

Lewis S. Hunte QC: Believe it or not, I intended to become a priest in the Anglican Church but when I was about 19 years old, an old Magistrate to whom I was a clerk, spared no effort in diverting my interest to becoming a lawyer; thus, prompting my mother to say: "My Lewis is going from Heaven to Hell".

KC - The King's Counsel Magazine: You were called to the Bar in November 1965 the year in which I was born so your exposure in law is so vast and you are still in practice. Truly an amazing feat. Tell us your impression about the English law and the British justice system. How has BVI benefitted from that.

Lewis S. Hunte QC: It is, indeed, a long time since I was at the Bar, but I have enjoyed, and still enjoy, every moment of it, and I would make the same choice if I had to do it all over again. You ask me about the British system of justice. Honestly, I have not really studied any other system, and I believe that no system of law is perfect and that ~~the~~ perfect law was never written. Not even the Ten Commandments! Yet I have enough confidence in the British system that I would recommend it to the world. Having said all of that, I have one criticism in the form of a question: Why place an accused in a dock guarded by a policeman if he is presumed to be innocent?

KC - The King's Counsel Magazine: You have had specialized training in legislative drafting at the University of Ottawa Canada and at the Federal Department of Justice of Canada. How has this been of help to you when you were the Deputy Chief Parliamentary Counsel in Barbados?

Lewis S. Hunte QC: I was fortunate during my stint in Ottawa to attend seminars held by the late Professor Diedger of the University of Ottawa. Professor Driedger was the Gamaliel of his day when it came to legislative drafting, and it was a privilege to sit at his feet. There, I learned much of the finer points of the science, which stood me in good stead over the years. I could never have functioned as Deputy Chief Parliamentary Counsel without training in legislative drafting, and I have found it useful in every aspect of legal practice.

KC - The King's Counsel Magazine: What were the challenges you have had to face when you were the Chief Prosecutor or the Attorney General of the British Virgin Island?

Lewis S. Hunte QC: When I became Attorney General of the BVI in 1982, there were only two lawyers on staff and each of them had, approximately, four (4) years' experience at the Bar. That of itself presented a challenge. The posts of Solicitor General and Director of Public Prosecutions did not exist, and all of the work that would normally been performed by the persons holding those posts, fell on the Attorney General. If that were not enough, the Post of Legislative Draftsman was vacant, and remained vacant during my tenure of office. The Attorney General was also an *ex officio* member of the Legislature and the Executive Council (Cabinet). My experience in legislative drafting was invaluable, and I drafted all of the legislation during those three (3) years. I was also able to attend to the prosecution of criminal cases, civil matters, attend all of the sittings of the Legislature and the Executive Council, as well as advise the government and the Governor.

KC - The King's Counsel Magazine: British Virgin Islands is a place for international banking and finance transactions and has a complex tax structure. How were you able to deal with such complex prosecutions? Do you think a separate office along the lines of Serious Fraud Office in UK should have been there to deal with serious crimes as it is a specialized area? Do you still advocate a separate specialized unit for prosecuting financial crimes?

Lewis S. Hunte QC: Your question relates to policy rather than law and would, therefore, be answered best by the policy makers and administrators. I merely drafted the legislation that provided the infrastructure or legal framework for the BVI as an international business centre. I was not responsible for the setting up of the structure or the administration. That fell on the shoulders of others. **I would only say that what works in the UK and other countries would not necessarily work in the BVI, and that is why the IBC Act of 1984 was not a copy of the legislation of any particular country. Every effort was made to create a statute that suited the purposes of the BVI.**

KC - The King's Counsel Magazine: The International Business Companies Act of the British Virgin Islands, is a brainchild of yours. We understand that this piece of legislation was built upon by your drafting team on the laws of Delaware but it is something advanced from the Delaware law. Would you like to elaborate more on this specialized legislation as it sounds like a very specialized piece of legislation which had been copied by other nations as well? What were the special features of this legislation?

Lewis S. Hunte QC: This is a complex question. First of all, I should point out that there was no drafting team as such. I was the only person at the time in the BVI with any kind of experience in legislative drafting. Secondly, I would not say that the legislation was my brainchild. To put matters in their true perspective, the idea of international business legislation was mooted before I came to the BVI. It was the idea of a US lawyer by the name of Paul Butler. The government wanted to replace the revenue that was lost as a result of the abolition of the double taxation treaties between the UK and the US. A few weeks after I took up the post of Attorney General, Butler, who was experienced in company

law but was not a draftsman, provided some ideas based on his knowledge of the Delaware legislation. I discussed Butler's proposals with two lawyers in the BVI who specialized in the practice of company law, and we formed the view that it was necessary to create a piece of legislation that would meet our needs. My knowledge of legislative drafting was, at that time, unknown in the BVI, so some people were a bit surprised when I told them that I would draft the Bill. Utilizing those two lawyers as resource persons, I met daily with them in deep consultation in the Attorney General's Chambers from 3:00 p.m. till 5:30 p.m. I would then go home and do the drafting at night and present my work for discussion the following afternoon. This process continued over a period of six (6) months until the final Bill was completed and ready for enactment. It is difficult to single out any one aspect of the legislation that made it unique, as most of it was creative thinking. One of its unique features was a company without shares. Until then, no one, not even the UK, had dared to embark on such original thinking.

Another feature of the legislation was the ease with which it was read, and its flexibility of application. Professor Driedger taught that, in writing legislation, every effort should be made to keep it simple so that no one should, as far as possible, have to read a sentence twice in order to understand what it means. That was a hallmark of this legislation.

KC - The King's Counsel Magazine: Has there been an economic book in the British Virgin Islands as a result of this innovative piece of legislation. What we gather from international media reports is that BVI is ahead of other financial markets owing to its innovative corporate legislation.

Lewis S. Hunte QC: As far as I am aware, no book has been written on the economy of the Virgin Islands but it has been officially acknowledged that the revenue generated as a result of the IBC Act far outstrips that earned by the tourist industry, thus driving tourism into distant second place as a revenue earner.

KC - The King's Counsel Magazine: Sir, what exactly was the reason for the cancellation of the double taxation treaty between BVI and the United States. I understand the reason for innovation was a result of this cancellation of the double taxation agreement.

Lewis S. Hunte QC: You mention the cancellation of the treaty with the US but, believe it or not, the US was only following what the UK had already done. The UK was of the view, perhaps correctly, that the double taxation treaty with the BVI was creating a drain on its revenue. But more US citizens than UK citizens made use of the treaties. It was, therefore, little wonder that the US adopted the stance set by the UK. The BVI sought the help of the UK in having the US restore its treaty, but the UK could not render any assistance because it had led the way by abolishing its treaty. Then, perhaps for the first time, the UK allowed one of its Overseas Territories to negotiate with a foreign country. Needless to say, the negotiations ended in failure.

KC - The King's Counsel Magazine: You have had a long association with Intellectual property laws, what was your engagement in drafting some of the legislation on intellectual property and international company law. What inspiration did you derive from the comparative law?

Lewis S. Hunte QC: My involvement with Intellectual Property law dates from the year 1977 or thereabout. It was purely

accidental. I was Deputy Chief Parliamentary Counsel in Barbados and I was asked to attend a meeting on Copyright held at the World Intellectual Property Organization (WIPO) in Geneva. I knew very little of the subject, but I, apparently, "caught the eye" of the Deputy Director General, who came up to me and offered to "make an expert" of me. I was flattered. I returned to Barbados, and as I was writing my report for Cabinet, I received a letter from the Deputy Director General confirming the promise. The result was a visit to the WIPO to attend their meetings, held every May and every September. I became sufficiently versed in the subject that one of my last functions in Barbados was the complete rewriting and updating of the intellectual property legislation in 1981. Barbados also hosted a conference on the subject financed by the WIPO. No inspiration was derived from the study of comparative law.

KC - The King's Counsel Magazine: You have had a long exposure in legal practice, could you tell us something about advocacy and why do you think a legal practitioner must invest more time on advocacy research and skills on the art of cross examination.

Lewis S. Hunte QC: The layman tends to admire the performance of advocates in court; but he has no idea of the time and effort spent in legal research and, in civil cases, the careful drafting of pleadings. What one sees in the court is the end product. Too much stress, therefore, cannot be placed on preparation.

Cross-examination is an art, and sometimes the question is more important than the answer but, very important is the sequence of the questions and the manner in which you marshal your artillery. You have to master the art of gaining the confidence of the witness. A hostile cross-examiner often fails in his or her effort to elicit vital information from a witness.

Take this bit of cross-examination by a prosecutor of a witness for the defence:

Q: Do you know the accused?

A: Yes.

Q: Do both of you work for the same company?

A: Yes.

Q: Do you get on well together?

A: Yes.

Q: As a matter of fact, you are friends?

A: Yes.

Q: Do you know that your name was mentioned as a conspirator with the accused in this case?

A: I heard the rumor.

Q; Is it true?

A: No truth in it whatsoever.

Q: You never had an opportunity to deny it publicly before, so I give you that opportunity now.

A: Thank you very much.

Then came the unplayable ball. The witness was in trouble, no matter the answer he gave to the following question.

Q: Do you know anything about this case?

A: No.

Q: And what are you doing here?

A: *Silence*

Q: Are you giving evidence in a case about which you know nothing?

A: *Silence*

Q: Have you heard of perjury?

A: Yes.

Q: So why are you here?

A: I thought I was here to say what happened upstairs.

Q: So, something DID happen upstairs? Tell the court about it.

A: *Silence*

This last question was a demonstration of the question being more important that the answer.

Of course, it is always important to know when not to ask questions, especially when you do not know the answer. Example:

Lawyer: Officer, what did the accused say to you when you cautioned him?

Police Officer: He begged me for a break, Sir.

KC - The King's Counsel Magazine: What was the most difficult case that you had to deal with in your legal career and why do you think it was difficult in terms of questions of fact or law or were there any other intricate issues surrounding the case?

Lewis S. Hunte QC: Oddly enough, the most difficult case I ever encountered was in sentencing a young offender during my time as a Magistrate. It was far more difficult than any case in which I appeared at the Bar. The accused was a sixteen-year-old male who was accused of stealing a transistor radio. He pleaded guilty. He claimed that he stole the radio to obtain money to buy food. When asked how much he sold the radio for, he stated the amount. When asked how much he spent on food he stated the amount. When the prosecutor was asked how much money was found on the accused when he was arrested, it was the exact difference between the selling price and the amount spent on food. Therefore, he was an honest thief. Not willing to send a sixteen-year-old to prison, I remanded him for three (3) days and requested a report from the Probation Officers who obliged. When the case again came before me, a big, strapping man interrupted the proceedings and said that he was the uncle of the accused; that he had owned a retail shop and could feed the accused; that he intended to have him learn a trade and when he gave him instructions he had to obey. That sounded good. I then asked whether he would consent to be surety for the accused if I placed him on probation. The uncle gleefully consented. Less that a week later, the uncle came to court and reported that the nephew had run away. Apparently, the uncle had taken a predatory interest in the boy. I instructed the uncle to report the matter to the Probation Officers. Fortunately, I did not have to deal with the matter as I was transferred from that court. However, I inquired of the Probation Officers who said that they dealt with the matter. I did not ask them what they did.

KC - The King's Counsel Magazine: Finally, Sir, we thank you for your time on

this subject, what advice would you proffer to a young Barrister in terms of professionalism and any pitfalls they must avoid.

Lewis S. Hunte QC: I have a word of advice and a word of warning for young people in the profession. The advice is the same that the Chief Justice of Barbados gave ~~to~~ me when he admitted me to practise as a young lawyer. He said: Work hard and come prepared. It was simple but profound advice. The word of warning is to be careful how you believe all that your clients tell you. An eager young lawyer once successfully defended his client on a charge of uttering counterfeit currency. He went into court after having only received 50% of his fee. To his utter horror, the client paid him the balance of his fee in counterfeit currency, of course.

"Oddly enough, the most difficult case I ever encountered was in sentencing a young offender during my time as a Magistrate. It was far more difficult than any case in which I appeared at the Bar. The accused was a sixteen-year-old male who was accused of stealing a transistor radio. He pleaded guilty. He claimed that he stole the radio to obtain money to buy food. When asked how much he sold the radio for, he stated the amount. When asked how much he spent on food he stated the amount. When the prosecutor was asked how much money was found on the accused when he was arrested, it was the exact difference between the selling price and the amount spent on food. Therefore, he was an honest thief. Not willing to send a sixteen-year-old to prison, I remanded him for three (3) days and requested a report from the Probation Officers who obliged. When the case again came before me, a big, strapping man interrupted the proceedings and said that he was the uncle of the accused; that he had owned a retail shop and could feed the accused; that he intended to have him learn a trade and when he gave him instructions he had to obey. That sounded good. I then asked whether he would consent to be surety for the accused if I placed him on probation. The uncle gleefully consented. Less that a week later, the uncle came to court and reported that the nephew had run away. Apparently, the uncle had taken a predatory interest in the boy. I instructed the uncle to report the matter to the Probation Officers. Fortunately, I did not have to deal with the matter as I was transferred from that court. However, I inquired of the Probation Officers who said that they dealt with the matter. I did not ask them what they did".

LEGAL QUOTES ON ADMINISTRATIVE LAW

PROF. PAUL CRAIG, EMERITUS PROFESSOR OF ENGLISH LAW, OXFORD UNIVERSITY

In purely legal terms, the UK is no longer bound by EU law, in the sense that new EU regulations, decisions and directives no longer bind the UK, nor does new case law from the CJEU. There are, however, exceptions and qualifications to these basic propositions derived the UK Brexit legislation, from the UK-EU Withdrawal Agreement and from the UK-EU Trade and Cooperation Agreement. Paradoxical though it may seem, the UK's exit from the EU went hand in hand with bringing the entire EU *acquis communautaire* into UK law. The paradox is, however, readily explicable. The UK had been part of the EU for nearly 50 years, with the consequence that many matters were regulated by the EU. There would commonly not be autonomous UK law in many of these areas. It was, therefore, necessary to bring the entirety of EU law into UK law in order to prevent the existence of regulatory black holes in the UK statute book. The idea was that the UK would then engage in a two-stage process. It would render the EU thus domesticated fit for purpose by the time that we exited the UK; the UK Parliament could then decide at its leisure thereafter whether it wished to retain, amend or repeal the EU legislation. This, however, led to complex domestic statutes dealing with issues concerning the status of retained law in the UK, and the extent to which UK courts could consider CJEU case law in the future. The UK courts will continue to grapple with these issues for a number of years to come.

Reference; The Anglo-American Lawyer Magazine, Interview with Prof. Paul Craig in April 2022

LEGAL QUOTES

Lord Chief Justice of England - Lord Woolf

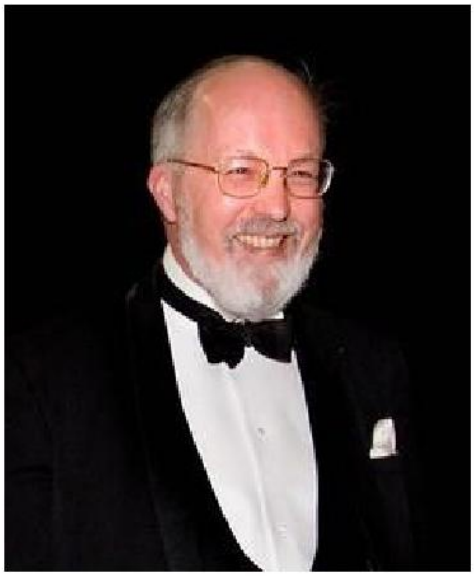
10th February 2005

"Independence of the judiciary is not only important to the judiciary, it is also important to the public. In the last resort, the judiciary provide the final protection for the liberty of the public. Judges provide that protection by upholding the rule of law. They do so when two neighbours fall out over their rights over a small strip of land which divides their properties. They do so when the liberty of individual members of the public is under threat. They do so by enforcing laws which the Government provides to protect the public. They do so by ensuring that the public's access to the courts is not inappropriately impeded. They do so regardless of the background of the litigant who seeks their assistance. Justice is provided irrespective of whether the claimant is a prisoner, a powerful business tycoon or an asylum seeker. Race and gender are of no importance. These qualities of our justice system are as important today as they have ever been.I take two rather obvious recent examples. The first concerns the detainees at Belmarsh. Whether you agree with the decision of the House of Lords or not, it is undoubtedly a decision of the greatest importance. The other example is the decision concerning the Hunting Act, as to which I say nothing about the merits because I am currently engaged in preparing my judgment. Both cases are interesting examples of the changing role of the courts.

The Belmarsh case is significant because it demonstrates clearly that, while in the past the courts would not interfere in matters that involved national security; rightly, this is not the situation today. Similarly, the litigation over the lawfulness of the Hunting Act is of interest because, in the past it is extremely doubtful that the question of whether an Act of Parliament had properly become law would be a subject capable of being adjudicated upon by the Courts. However, it is now uncontroversial that the Courts can, at least in limited situations, do this. A feature of both these cases is that public interest groups were given access to the courts. This is, in itself, a novel way of giving greater access to the courts. In the United States this has long been the practice. Courts receive what is known as a "Brandes Brief" [named after Louis Brandeis, who became a Supreme Court Judge, but who, in 1908, used the brief named after him to persuade the court that the minimum pay legislation for women was reasonable and not unconstitutional. (See Muller v Oregon 208 US 412 [1908])]."

Reference ; https://www.judiciary.uk/announcements/speech-by-lord-chief-justice-a-new-constitutional-consensus/

INTERVIEW - Prof. Sir John H. Baker Q.C., LL.D. (Cantab.), F.B.A., On the History of the Laws of England.



Prof Sir Baker was educated at University College London (LLB 1965, PhD 1968). He was called to the bar by the Inner Temple (1966) and taught law at University College London (1965-70) and Cambridge University (1970-2011). He was appointed Professor of English Legal History, Cambridge (1988-98), Downing Professor of the Laws of England (1998-2011), Fellow of St Catharine's College, Cambridge (1971-) and University College London (1991-); LLD, Cambridge (1984); Fellow of the British Academy (1984) and Honorary Foreign Member of the American Academy (2001); Honorary LLD, Chicago (1992); Honorary Bencher of the Inner Temple and Gray's Inn; Queen's Counsel honoris causa (1996); knighted for services to legal history (2003); Literary Director of the Selden Society (1981-2011); author of *An Introduction to English Legal History* (1971; 5th edition, 2019), *The Reinvention of Magna Carta 1216-1616* (2017); *English Law under Two Elizabeths* (2021), and numerous other books and papers.

The AAL Magazine: What a great pleasure and honor it is to interview such a distinguished Downing Professor Emeritus of the Laws of England at the University of Cambridge where you have excelled in research on the History of Laws of England. Professor, I have had the benefit of reading your profile which gives details of a serious of books and volumes you have published. I think your contribution to the history of the Laws of England is so immense and I really could not understand the amount of time you must have invested in gleaning all the information produced therein. You have delved deep into the history of England the development of law in such a background where searching historical materials are extremely difficult and it is indeed a huge exercise in research. You have been amply rewarded with a number of high academic

credentials and honorary doctorates by Universities in recognition and in honor of the research you had undertaken. If I may begin this interview, could you explain to us as to what this 'Downing Professor' denotes?

Prof. Baker: It is the name of the first chair of English law established in the University of Cambridge. It was originally part of the foundation of Downing College, named after Sir George Downing (d. 1749).

The AAL Magazine: It is not clear as to what constitute the 'Laws of England' and the 'English Common Law'. Of course Common Law is the Judge made law, my issue is whether there could be some elements of judge made law having been codified and the Laws of England having been introduced by the Parliament. Could there be some intermingling of both. Judge made law could not possibly have been derived without reference to the political and social setting at the time the Judge expounded the law unlike in the U.S where the law is expounded with reference to what framers had in mind at the time the constitution was drafted. Would you elaborate on the research that you have undertaken especially in the context of the social settings.

Prof. Baker: As you say, the laws of England consist of both statute law and unwritten common law. The position is similar in the United States, save that the Supreme Court has assumed the power to strike down legislation which it considers to infringe the written constitution. Exercising that judicial power to review legislation creates a different kind of judge-made law, though I think it is a matter of controversy whether it should be tied to the original intent or whether it can evolve like the common law. If they followed the original intent, they would still have slavery. In the United Kingdom we do not have a written constitution and therefore Parliament is supreme. Acts of a legislature obviously respond directly to social changes and political pressures. But the relationship between the common law and social change is more complex than one might think. The common law does have to adapt as the world changes, but the judges cannot simply overturn long-standing principles derived from centuries of argument and reasoned thinking. It is therefore a slower process, moving step by step from an agreed starting point – and it may sometimes be so gradual that Parliament feels it necessary to take over. One thing the judges are not free to do is to impose taxation, and this means that they cannot by developing the common law bring about the kind of social reforms which require monetary expenditure or which require the balancing of interests which are not represented before them in particular litigation. Even setting up enquiries to consider reforms costs money.

The AAL Magazine: If I may ask you Professor, you have started the Volume I from the Canon Law and Ecclesiastical Jurisdiction from the fifth century to sixteenth century. I would say it is a fairly long period - almost a millennium. Would you expatiate upon on the nature of research that must have influenced this volume? England was governed by Roman Empire up until fourth Century surely there must have been some sort of a clash of Papal

influence of Roman law and the adopting of Latin legal maxims. The first volume also covered the period between the emergence of Protestant movement in England and Europe ending Sixteenth Century.

Prof. Baker: the Oxford History of the Laws of England is a series of volumes written by different authors. I am the general editor but have only written one of the volumes myself – Volume VI (1483-1558). Volume I was written by Professor Helmholz. But I can respond to your question by saying that the Christian Church probably did not reach England until after the Romans had left. There was therefore no Roman law operating in England which could have influenced the law of the Church when it was received here. That influence came through the universities, starting with Bologna, where doctors trained in Roman law reduced the rules and regulations of the Church into some kind of system. I don't think this could be called a clash – the two systems of law went hand in hand. If there was a clash it was with the English common law, which was developed by lawyers practising in the king's courts. Until the nineteenth century those lawyers belonged to a completely separate profession from the doctors of law who practised in the Church courts.

The AAL Magazine: Was there a social phenomenon that changed the style of governance and enactment of laws which were pro Roman Government and the defiance of Roman law under Protestant movement after the 15th Century. Was there any deliberate move to defy the Roman laws enacted during Roman influence in England?

Prof. Baker: As I said in my last answer, the Roman law did not operate in England after the Romans left – which was many centuries before the common law came into being. I think your question relates more to the law of the Church. In England, the Church's jurisdiction was primarily concerned with marriage, wills, intestate succession to movables, and the punishment of lesser sins. Land law, contract, tort, and the punishment of more serious crimes belonged to the king's courts of common law. The break with Rome in the sixteenth century had virtually no effect on the jurisdiction of the Church courts, since the law of marriage, wills and succession remained the same. It was more about theology, and whether it was right to burn people alive for failing to believe in the theories of theologians.

The AAL Magazine: Your Co-Editor John Hudson, has delved into translations and quotes extensively from the original sources which were previously only available in Latin, Old English and Old French, and he has opened the source for a wider range of readers. Professor, how were these sources referred to and where were you able to source them. I know England has a corpus of literature from the early times and they are well preserved by the Archivists. The Church of England Archives Oxford University Archives are yet another source of ancient archival repositories. Would you advise as to how these sources were accessed to as I feel a future researcher might find it interesting. Where do you consider being the place from which you got 'a wealth of information'? To which library

do you attribute being the greatest repository of the English law history?

Prof. Baker: As I indicated in a previous answer, John Hudson was the author of the second volume in the Oxford series, not a co-editor. He had to use a wide range of original sources, because much of his period predated the keeping of records by courts. For the later periods on which I have written myself, we have a continuous record – written in Latin on parchment – of every case heard in the central royal courts from the 1190s onwards, and an increasing range of records of cases heard in other courts, not to mention a professional literature and more plentiful extra-legal sources. The Church itself has few if any records of this kind – indeed, the Church of England as such does not have a relevant archive. The principal records are in the Public Record Office at Kew (near London), and most of the court-records which are kept there can now be read in digital photographs – at any rate, by those who can read abbreviated Latin written in 'court hand' – via the website called Anglo-American Legal Tradition (http://aalt.law.uh.edu/). This is a resource of immense value, created by the energy and dedication of Professor Robert Palmer of the University of Texas at Austin and a team of helpers. Besides the records kept by courts, there are the law reports and other materials written by lawyers. These have survived in libraries all over the world. The largest collection of legal manuscripts (other than records) is in the British Library, London, followed by Cambridge University Library and the Harvard Law School. Many important texts, including medieval and early-modern law reports, have been edited by the Selden Society, with parallel English translations of the Law French and Latin. Printed law books from the fifteenth century onwards can be read via the website Early English Books Online. But the full range of available material is very large, including for later periods treatises, lectures, opinions of counsel, lawyers' correspondence, family muniments, and so on. We can also sometimes derive insights from lay literature and polemical tracts.

The AAL Magazine: We would like to know how the English law has evolved over a long period time and what were the core elements of English law, that was subjected to change over such a long period of time. Was it the rationality and reasoning on which the British judicial system was grounded or could there be any other reason which you have discovered during your research.

Prof. Baker: That is rather a large question to answer in a nutshell, though I have suggested the outlines of an answer already. Statutes come from Parliament after political debate and, being written, lack the flexibility of the common law. The judges cannot rewrite statutes to make them more sensible or rational, but they do have to interpret them and their decisions as to what statutes mean form a kind of case-law which is different from the common law. The development of the common law itself is quite different, since it takes place over the long term as a result of argument in court by lawyers putting opposing points of view, and reasoned responses to those arguments by judges and appellate courts.

Every new step has to be justified in terms of previous reasoning, though it is sometimes possible to correct what seem to be errors in previous conclusions or to introduce countervailing reasons which were not considered in previous cases. In many respects the methodology of the common law is superior to that of parliamentary statutes, though the latter necessarily take precedence and can extinguish common law. Legislation is necessary to bring about changes which courts are not permitted to bring about, especially those which require public funds to be made available. Nowadays we live in a regulatory state and so most of the law is contained in statutes and statutory instruments, though most of it is quite unknown to ordinary persons (or even to lawyers) and does not directly concern them. In late medieval times, most of the law was common law, found not only in reported cases but also in the teaching of the inns of court. The earliest statutes were brief and broadly worded and also had to be expounded by courts and in the inns of court. However, the development of the common law by reasoning from case to case has followed much the same pattern over a great many centuries. What has changed is not so much the fundamental character of the common law as the world on which it operates.

The AAL Magazine: Professor, I would be curious to know how Normans, who spoke French, had enjoyed customary law in Normandy, there does not seem to exist any evidence of any professional lawyers or judges or any judicial system existed in Normandy. The clergy was hugely influenced by the Roman law and the Canon Law of the Christian Church. How was the reception of Norman influence in developing the English law? What impact did it have on the development of English law principles? Do you think this is a new area for further research?

Prof. Baker: How far the Norman 'conquest' of England in 1066 altered English law was a topic of heated controversy in the time of Elizabeth I and it is still being argued about in the time of Elizabeth II. The Normans themselves were keen to emphasise legal continuity from before 1066, since they claimed England by right rather than by conquest; but they did in fact introduce significant changes in the patterns of landholding. Their innovations were not a matter of transplanting jurisprudence but a reflection of military feudalism, which was to some extent a form of social organisation imposed from above. But they had to be blended with what was there before. You are right that there were no professional lawyers in Normandy in 1066, any more than there were in England. And there were variable customs rather than a body of law like the common law. We usually consider the common law to have come into being during the twelfth century, not as a direct result of the Norman invasion but as a result of the strengthening of central institutions. You cannot have a 'common' law – that is, a law common to the whole country, until you have a legislature and a legal system exercising a uniform authority over the whole country. There is much valuable research already being done on these questions – for instance, in addition to Professor Hudson's book in the Oxford

series, the work of Professor George Garnett. As to French, it was used by English lawyers (in a gradually declining dialect known as Law French) until the seventeenth century; but it was not the French of the Normans. It seems to have been adopted in the early days of the common law for argument in court, not in deference to the Normans but because it was a more standardised language than the English dialects of that time and more readily transposed into the Latin of the records.

The AAL Magazine: Professor according to the history of the Inns of Court, they seem to have begun professional training after 15th century. The oldest one among the four is Inner Temple which has a history stems from 12th century onwards. The King's Inn - which still operates in the Republic of Ireland - had commenced its operations during the 15th century when Ireland was under British Dominion. Would you please elaborate on the standards of legal training at the time English justice system evoked from the history?

Prof. Baker: I think the Inns of Court began in the mid-fourteenth century and there is evidence that they had educational functions more or less from the beginning. Although I am a bencher of the Inner Temple, I could not in honesty support a suggestion that it was older than the others. The Inns certainly did not exist in the twelfth century. The Temple existed then, but it was the home of the Knights Templar, not of lawyers. We still have the ancient Temple Church, part of which was consecrated by the Patriarch of Jerusalem in 1185, on whose floor lie stone effigies of knights – including William Marshal, one of the instigators of Magna Carta. But the lawyers came after the order of knights had been dissolved and their possessions given to the Knights Hospitaller of St John, who did not need the Temple for their own use. Before 1400 each of the four Inns of Court – supported by ten or so lesser inns for younger students – had developed an educational regime based on that of the universities, with lectures (given on statutory texts) and disputations or moots. That system collapsed in the seventeenth century, but it has since been replaced by a modern equivalent. A significant change in legal education occurred in the nineteenth century, when the universities of Cambridge and Oxford – which had always taught Roman law – and also the newer universities began to teach and give degrees in English law. Intending lawyers could then learn the basic principles of English law at university and move on to the more practical aspects of the law after graduation.

The AAL Magazine: Professor, why there is a separate body of Poor Laws developed in England. Why was it required to focus on Poor Law when Britain was relatively a wealthy nation by 15th Century? There may have been a temporary setback but why was it made known as Poor Law.

Prof. Baker: We now call it social security, and the root premise is that some people are not sufficiently fortunate to be able to earn their living by their own efforts or to be supported within a family. How to deal with this problem has been a matter of debate and the subject of various legislative solutions from the sixteenth century to the present. It was not a matter for the common

law, because it required the taxation of those who were more fortunate in order to support those unable to work, and this was originally managed at a local level of government – the parish (usually corresponding to a village, or part of a town). The main difficulty, in the sixteenth century as now, was how to make a fair distinction between those who were genuinely incapable of working and those who were simply idle. That calls for political decisions and actions rather than legal reasoning, and I suppose that is why legal historians have not paid it as much attention as perhaps it deserves.

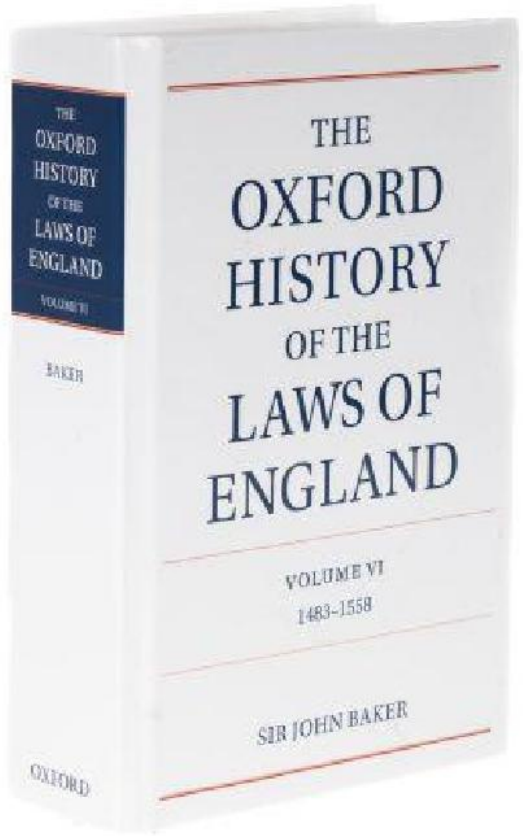
The AAL Magazine: Sir Mathew Hale says legislation of 1598 and 1601 was passed at a time when the problem of poverty was unusually severe. There had been a low productivity of harvest and it was the worst of the period. There had been a steady increase of issues involving unemployment and food supplies which had not kept pace with. Professor why did it take such a dramatic turn to refer to these laws as English Poor Laws. What sort of laws are considered poor law and are they still in force.

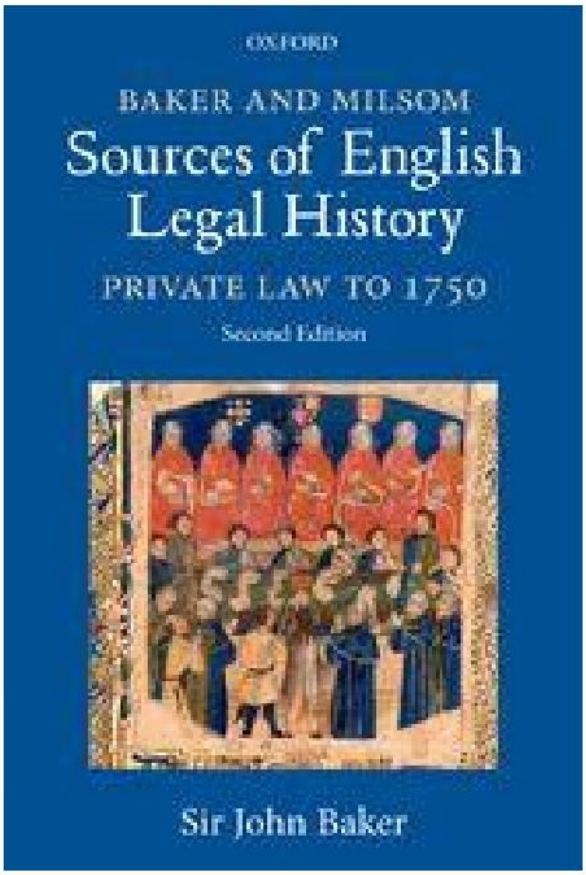
Prof. Baker: I cannot really add to my previous answer. There were poor laws continuously in being from the sixteenth century onwards, but their content was constantly being adapted not only to deal with emergencies such as poor harvests and plagues but also to reflect different theories as to the best remedies for poverty. There was a major overhaul of the poor law in the early nineteenth century with the establishment of 'work-houses', but we now have a more sympathetic approach to social security. As I have indicated, it is not a subject on which I have conducted any research myself.

The AAL Magazine: Professor, prior to your research there have been some research on the History of English Law by Sir William Holdsworth, Sir Frederic Pollock co-authored with Frederic William Maitland, John Hudson, Harold Potter, Mathew Hale, and yet another one by George Crabb etc. How do you compare your extensive volumes published by the Oxford University Press and what sort of new sources you have discovered during this research?

Prof. Baker: As with the common law, so our understanding of English legal history develops gradually from one generation to another as a result of research and debate. We all build upon what went before. Coke, Hale, Selden and other early writers were interested in legal history chiefly because they thought it directly informed the law of their time. History was not an end in itself, and it did not enter the university curriculum until the later nineteenth century. The Selden Society was named after John Selden (d. 1654) with good reason, though most of us now regard the founder of our subject in its present form to have been Maitland – prime mover of the Selden Society in 1887, and Downing Professor of the Laws of England from 1888 to 1906. Holdsworth's massive history is not so much consulted today, and the reason is that it was only practicable for him to write it from published sources. The principal change in English legal history since the death of Holdsworth in 1944 – four months before I was born – is that we have come to

appreciate the fundamental importance of materials beyond the printed law reports and statutes. The principal legal historian of the twentieth century is one you did not mention, Professor S. F. C. Milsom (d. 2016), who had more influence on my work than any other. But it is right to mention also Professor A. W. B. Simpson (d. 2011), another pioneer of the use of manuscripts, and there are several others now living whom I will not embarrass. The purpose of the Oxford History of the Laws of England is to provide the same breadth of coverage as Holdsworth while taking account of subsequent research in a wider range of sources. It is proving a lengthy task, though – it is well over thirty years ago since we decided to undertake it, and only about half is finished. Some of the original authors died before writing anything, and others seem to have been overwhelmed by the task. But it will be finished one day.





INTERVIEW - CANADIAN ATTORNEY MICHAEL OSBORNE

ON COMPETITION LAW OF CANADA

Michael Osborne is a partner in the Litigation and Competition & Foreign Investment Groups at Cassels. Michael advises and defends clients in inquiries and proceedings commenced by the Competition Bureau, including criminal matters, abuse of dominance, and marketing and advertising matters. He defends clients in private proceedings under the Competition Act, including price fixing class actions. Michael acts for and advises parties in a wide range of commercial disputes, including contractual disputes, shareholders' disputes, commercial fraud, and employment matters. He also offers experience in a range of regulatory and white-collar crime matters. Michael has acted as trial and appellate counsel before all levels of court across the country, the Competition Tribunal and other administrative tribunals, and arbitral tribunals in international and domestic arbitrations, both institutional and ad hoc. Michael is also an arbitrator, and a Fellow of the Chartered Institute of Arbitrators.

The AAL Magazine: Michael Osborne, thank you for the opportunity to interview you on issues concerning competition and fair trading in Canada. You are a senior legal practitioner specializing in competition law and have had the privilege of representing key companies in Canada. If I begin this interview, may I first ask a question on moral reasoning. What exactly is fair trading in a very competitive environment?

Michael Osborne: Although some attempt to imbue arguments in competition cases with a moral perspective, I would argue that modern competition law is not based on a view about what is morally right, but on an economic assumption. That assumption is that consumers, businesses, and the economy more generally, will benefit from competitive markets. That benefit is primarily material; consumers will benefit from greater product selection, greater innovation, and lower prices. Businesses and the people who work for them will benefit as well.

Competition law only makes sense in the context of a free market economic system. The assumptions underlying competition law are closely related to those underlying free markets. In an economic system based on monopolies (such as the guilds of mediaeval Europe) or state ownership of most businesses (communism, for example), competition law makes little sense. This remains true in sectors of the economy that are nationalized or are natural monopolies, for

example, electric and natural gas utilities, or rail systems. In those cases, competition cannot regulate prices; instead, the government must establish a price regulator.

Competition has a destructive side: inefficient businesses will fail, and the people that work for them will lose their jobs. Thus the process of creation and destruction that competition implies creates great benefits, but also, for some, hardship.

As a result, sometimes a "moral" approach might lead one to prefer non-competitive markets. But this can have quite serious unintended effects. One good example of this is Canada's agricultural supply management system. Supply management was introduced in the 1960s and 1970s in order to protect farmers in certain sectors (principally dairy) from the vagaries of the market. The system effectively cartelizes dairy markets in Canada, ensuring that farmers receive a price that exceeds the costs of production. While the system certainly does that, it lowers incentives to reduce costs and increases the price of milk to well above international levels. The OECD has estimated that consumers pay about $2.5 billion more for milk than they would otherwise. The system also creates massive barriers to entry for would-be dairy farmers, as they must buy quota in order to enter the market. In order to prevent quota from becoming too expensive, some provinces regulated the price of quota, with the result that very little quota is available on the market.

The AAL Magazine: Do you see the same economic underpinnings are applied in the Anglo-American world eg in the U.S, UK, Australia and other Commonwealth countries and whether this has any difference under EU jurisprudence.

Michael Osborne: There is today a broad global consensus on the importance of competition law and its main purposes. While Canadians like to brag that our first anti-cartel legislation was enacted one year before the Sherman Act in the US, the truth is that competition law was largely invented in the US, where it is called antitrust law. In recent decades, most countries around the world have adopted competition legislation. Free trade agreements now typically contain a chapter on competition law. Competition law is promoted at the international level, by the Organization for Economic Co-operation and Development and the International Competition Network (ICN). The ICN is a forum for competition authorities from around the world to discuss best practices.

Despite this broad agreement, countries do diverge. The US takes an avowedly consumer welfare approach to competition policy. Canada, but contrast, looks are broader economic factors, including efficiency. This plays out in merger control. In Canada, a merger that will lessen competition will nevertheless be permitted if it creates efficiencies that outweigh the harm to competition. Efficiencies are, in short, a complete defence. In the US, efficiencies are but a factor to be considered; they are not a defence.

One of the main divergences is between the approaches taken in North America and Europe to abuse of dominant position. Europe is much more interventionist than North America. In Europe, a dominant undertaking is considered to have a "special responsibility" towards its competitors. Effectively, large firms are expected to pull their punches to some extent when competing. This is not the case in North America, although there are signs this may be changing.

Another example is South Africa's merger control regime, which imposes a broad public interest test that looks at, among other things, the effect of the merger on employment and on

businesses owned by historically disadvantaged people.

The AAL Magazine: I have not seen much citation of EU jurisprudence in Canadian competition cases. Have you ever driven your arguments based on the jurisprudence advanced in the EU competition and fair trading cases?

Michael Osborne: EU jurisprudence is rarely invoked in competition cases by the parties, the Competition Tribunal, or the courts. By contrast, US cases are frequently cited.

The AAL Magazine: I assume the underlying legislative rationale of the Competition law in Canada is to create a competitive business environment. The purpose of the Competition Act says that it is 'to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices'. Has the Government of Canada been able to maintain this policy objective since the time the Competition Act was enacted?

Michael Osborne: The purpose clause of the *Competition Act* is frequently cited. Yet because it consists of a list of aims that are to some extent in tension, it is rarely determinative. There is considerable debate in Canada over the role of efficiency in competition law. At the moment, it provides a complete defence to an anti-competitive merger. The Competition Bureau (our competition authority) has been agitating for years to remove the efficiencies defence.

One of the assumptions underlying the Competition Act—and competition laws around the world—is that establishing "rules of the road" for businesses will lead to all of the things that we want: lower prices, more choice, and better products. When this does not happen naturally, governments are sometimes tempted to intervene to achieve the desired outcome. Those interventions are rarely successful, however. One example in Canada is the federal government's policy of trying to encourage new entrants into the mobile telephone market. The government wants a fourth national wireless carrier in order to bring down Canada's mobile prices, which are among the highest in the world. The government has set aside spectrum for new entrants, and requires incumbents to allow these new entrants to roam on incumbent networks. This policy has been a failure. While there are regional fourth carriers, none has been able to mount a serious challenge to the three incumbent national networks.

The AAL Magazine: I could not find a proper definition of what exactly competition means. The purpose of the Act is simply a policy objective only. Have you found in your practice that proper definition of competition should have been incorporated? Given the huge corpus of jurisprudence having been built up over the years, do you think it is about time the Government of Canada looked at the Competition law holistically? After all, the original act was enacted in 1986.

Michael Osborne: No, I do not think that a statutory definition of "competition" would be successful. "Competition" is notoriously difficult to define. Legislators generally have not attempted to define what it means, but have instead left it up to tribunals and courts to do so. I think that is the right approach.

Competition is not a thing but a process. Competition exists where firms actively compete with each other for business. The *Competition Act* includes competitive effects tests for evaluating mergers and potentially anti-competitive conduct, most notably, the substantial lessening or prevention of

competition test. This test is actually quite well understood. It involves comparing the level of competition with the merger or conduct in question with the level that would obtain but for the merger or conduct. One of the most important indicia of whether competition would be substantially reduced is whether prices would be lower but for the merger or conduct.

The *Competition Act* was enacted in 1986, following two decades of debate about amendments to its predecessor, the *Combines Investigation Act*. The 1986 Act has been hailed as the most economically literate in the world. It has been amended numerous times. The biggest of these changes was the new conspiracy provision, which came into force in 2010.

The Senate of Canada is currently conducting a review to determine whether the Act should be amended to better deal with the digital economy. While countries should review competition legislation from time to time to make sure it responds to the needs of the economy and that there are no gaps, competition law is meant to provide a broad, flexible framework. In other words, competition law should not need amendment every time some new issue appears. Rather, it is meant to be flexible enough to respond to new challenges.

The AAL Magazine: When it comes to a 'monopoly' a proper definition is also required. In some cases due to lack of competitive participants in the market a company could be known or described as being a monopoly or engaged in monopolistic practices unwittingly. The prejudices also might play a role in looking at a certain entity. It could be driven to be seen as a monopoly because there are no known competitors of that product. In some cases a product could be an important link in the Canadian supply chain. Do you think given such a scenario a proper definition should also be articulated? Yet another matter for law reforms I assume.

Michael Osborne: While the term "monopoly" is often used as a shorthand, the more accurate expression is "market power". Market power means the ability to behave independently of the market, for example, a firm that can raise prices without being constrained by competitors is said to have market power. In broad terms, competition law in Canada and around the world is concerned with the acquisition and abuse of market power. It does so in three ways: First, it prohibits collusion between competitors, such as price fixing and bid rigging. In Canada, the US, the UK, and many Commonwealth countries, cartels are punished as criminal offences. Second, it controls the acquisition of market power through mergers. In Canada, as in most countries, the merger control regime is permissive. That is, firms are permitted to merge unless the Competition Tribunal finds that the merger will lessen or prevent competition substantially. Third, it steps in where a firm that has market power abuses that market power to exclude, discipline, or predate against rivals. This behaviour, known as "abuse of dominant position" or "monopolization", is the most difficult to recognize, because the line between anti-competitive conduct and aggressive competition on the merits is extremely hard to draw in practice. This makes enforcement decisions difficult. An overly interventionist approach will actually reduce competition, as it will cause large firms to compete less aggressively. But a failure to constrain anti-competitive conduct will lead to small firms being unable to enter and expand in the market.

It is also important to understand that competition law does not penalize firms for having market power, or for achieving market power in desirable ways, such as through innovation, better products, or better service. Market power is in a sense the prize that firms are competing for; they compete to produce a

better product that will command a higher price and generate greater profits.

The AAL Magazine: Do you think if the consumer is denied a choice, it is a matter for the trade policy of the Government. Do you think the government should encourage new investors in that market place so that people are given more choices?

Michael Osborne: Competition law is about providing greater choices to consumers. Investments that create new businesses help increase that choice. Thus governments should encourage investment, both to grow the economy and broaden consumer choices. The question is how. Governments have different tools at their disposal to encourage—or discourage—investment. Tax policy can, for example, either provide an incentive or a disincentive for firms to invest in Canada. Businesses want low taxes of course, but they also need to have the infrastructure and security that governments provide. Regulatory burden is another tool. Here also, governments must establish appropriate safety, environmental, and employment standards, while not creating an unwelcoming investment climate. The legal system is also important: it is crucial to offer an independent judiciary that respects the rule of law, and that does not discriminate against foreign parties. Competition law is part of this. Having fair "rules of the road" assures investors that they will be able to enter and expand in markets in Canada. Many countries, including Canada, have legislation designed to enable the government to block foreign investments that are not in the public interest. Since 1985, Canada has had a largely permissive foreign direct investment regime. Investments above certain thresholds are permitted only if they are found to be in the public interest. These thresholds are quite high, however. For example, companies from WTO countries make investments up to $1.141 billion before requiring approval. These thresholds are lower for state-owned enterprises. Investments in certain sectors, such as cultural businesses, airlines, and telecommunications, are subject to further restrictions. The Investment Canada Act also provides for national security reviews of investments.

The AAL Magazine: If there are more than two Canadian companies engaged in exports but not relevant to domestic consumption, does the Act cover competitive practices in the export market as well. I would assume the legislative rationale of the Competition Law strictly speaks of competition within Canada but I have my reservations over its applicability to Canadian companies engaged in exports.

Michael Osborne: The Competition Act is primarily about competition in Canada. In principle, Canada has no business regulating competition in other countries. But what happens when a Canadian firm engages in behaviour that harms competition in another country? The answer is not so clearcut. Foreign competition authorities and courts might well take jurisdiction in those cases. But while Canadian courts readily enforce foreign judgments in civil matters, they are unlikely to enforce decisions of foreign courts or competition authorities under their competition laws. It may be possible to bring a proceeding in Canada on the basis of harm in another country. This is done frequently to combat cross-border frauds. But in those cases, the foreign country would have to rely on the Competition Bureau to bring the case. What is more, Canada's cartel offence provision contains an exception for export cartels. That said, the Competition Bureau collaborates frequently and closely with its counterparts in the US and the EU on cases, particularly merger review.

The AAL Magazine: There have been situations where a company could maintain a market dominance and derive benefit from that to win export orders. A company would say they are

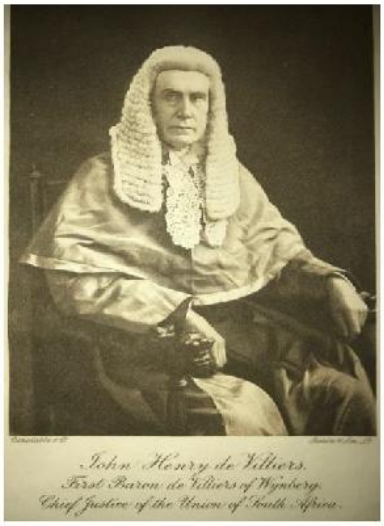
the largest producer of product X in Canada and have had no issues whatsoever with that product. Eg. An aircraft manufactured in Canada with no serious safety issues. This situation would enable a Canadian company to secure deals overseas by self-glorifying its successes within the Canadian market. By over regulation of 'dominant market' principle - would it not hamper chances of Canadian companies to secure orders from overseas?

Michael Osborne: In the first place, competition law does not penalize firms for having market power. The fact that a firm has market power is not a basis on which to bring any kind of proceeding. It is only when that firm attempts to increase or retain its market power using conduct that excludes or disciplines rivals, or through predatory behaviours, that competition law intervenes. There is a perennial debate over whether we should encourage the development of "Canadian champions". That is, should we calibrate our competition policy so as to foster the growth of large firms that can compete on a global scale? Because Canada is a relatively small market, this could involve allowing mergers that will reduce competition in Canada, on the basis that the merger will produce a global powerhouse firm that can compete globally. The problem with this approach is that monopolies tend to become inefficient. They stop responding to consumers; they stop innovating and improving their products. When that happens, the firm becomes less, not more, competitive on the global market. In short, the best way to encourage the development of firms that can compete globally is to have an open economy that exposes firms to the harsh winds of competition.

While the term "monopoly" is often used as a shorthand, the more accurate expression is "market power". Market power means the ability to behave independently of the market, for example, a firm that can raise prices without being constrained by competitors is said to have market power. In broad terms, competition law in Canada and around the world is concerned with the acquisition and abuse of market power. It does so in three ways: First, it prohibits collusion between competitors, such as price fixing and bid rigging. In Canada, the US, the UK, and many Commonwealth countries, cartels are punished as criminal offences. Second, it controls the acquisition of market power through mergers. In Canada, as in most countries, the merger control regime is permissive. That is, firms are permitted to merge unless the Competition Tribunal finds that the merger will lessen or prevent competition substantially. Third, it steps in where a firm that has market power abuses that market power to exclude, discipline, or predate against rivals. This behaviour, known as "abuse of dominant position" or "monopolization", is the most difficult to recognize, because the line between anti-competitive conduct and aggressive competition on the merits is extremely hard to draw in practice. This makes enforcement decisions difficult. An overly interventionist approach will actually reduce competition, as it will cause large firms to compete less aggressively. But a failure to constrain anti-competitive conduct will lead to small firms being unable to enter and expand in the market.

Lord de Villiers and the Cape Town Abatto

By Eben Van Tonder
For further research please contact Eben Van Tonder ; ebenvt@gmail.com



We hiked across the De Villiers Reservoir on Table Mountain last Saturday and I was intrigued. I suspected he was chief justice and confirmed this when I got home. He was part of shaping the fabric of the modern Cape. Sir John Henry de Villiers, known as Hendrik (15 June 1842 – 2 September 1914) was a Cape lawyer and judge. He was Attorney-General in the Molteno Government, Chief Justice for the Cape Colony, and later the first Chief Justice for the Union of South Africa. There is an interesting story about him and the South African meat industry in one of the cases he presided over. This one relates to the closing of the old Cape Town abattoir. The city abattoir was located at the bottom of Adderly Street where the railway station now stands. In 1883 a lawsuit was brought against the city on the basis that the Shambles, as it was called, was a public disturbance and had to be removed. Sir Henry de Villiers, as chief justice, led a full bench of the Supreme Court to hear the case. An in-person inspection was carried out one morning after the slaughter of animals. The judges and lawyers walked the beach; sewerage was flowing into the sea; the stench was unbearable. In those days slaughtering houses were often constructed on beaches or next to rivers that the blood would run into the water or disappear under the sand and offal would be removed by the incoming tide.

Late in 1883 Justice de Villiers delivered judgment and said that the least the city could do was to slaughter the animals elsewhere. This sealed the fate of the Shambles and it was moved. Instrumental in the campaign to have the city cleaned up was the 22-year old David de Villiers Graaff, the father of the South African meat industry who at this point was running Combrinck & Co which later became The

Imperial Cold Storage & Supply Company and later re-branded the name to ICS. Roy Oliver who is a technical mastermind in the meat industry and a colleague at Woodys Consumer Brands worked for an ICS subsidiary for many years in Namibia. It was this event of closing the Shambles, which prompted Combrinck & Co. to install their own slaughtering line. When Jacobus Combrinck who started Combrinck & Co. and who brought the young David to Cape Town, passed away on 8 August 1891, the funeral service was conducted in the Groote Kerk. From there the procession moved to the Maitland Cemetery where the pole bearers were Cecil John Rhodes, J. W. Sauer, Onze Jan Hofmeyer, Sir Gordon Sprigg, Colonel F. Schermbrucker, M. L. Neetling, D. C. de Waal and Sir John Henry de Villiers.

This was an interesting mix of people as many of them shaped the landscape of modern Cape Town. Throw into the mix that David de Villiers Graaff and his brothers were key features at the funeral since they, together with one sister, lived with Jacobus Combrink in his Woodstock mansion and also erected the headstone that is over the grave of Jacobus.

Sir David de Villiers Graaff and Lord/ Sir John Henry were close family. Three De Villiers brothers came to South Africa with their wives. They were Abraham and his wife Susanne, Pierre and his wife Elizabeth, daughter of the hat maker of Thierry in the province of Bri and Jacob and Susanne's sister, Marguerite. The three sons' father was Pierre de Villiers from La Rochelle in France. The second son, Pierre and his wife Elizabeth had a son, also called Pierre. Young Pierre married Hester Roux and in 1725, they had a son. Since French as a language was dying out at the Cape, the named him Pieter. Pieter married twice. With his first wife, he had nine children and with his second wife, eight. The biographer of Lord de Villiers, Eric A. Walker called him a "notable parent" which is probably an understatement!. Jacob Nicolaas was born to them in Paarl in 1786. He married Suzanne Maria Bernhardi and named their oldest son Carl Christiaan who, in 1834 married Dorothea Elizabeth. They had nine children and the fourth son was John Henry de Villiers. He signed his name, not as John Henry, but as Johan Hendrik. He was born on 15 June 1842.

Sir Davids father was Petrus Novbertus Graaff and his mother was Anna Elizabeth, daughter of Pieter Hendrik de Villiers. This has definitely been traced somewhere, but it is fun working it out for oneself. It seems that Anna's father was the brother of J. H. de Villiers, which then makes Lord de Villiers, the uncle of the wife of Petrus Graaff, the father of Sir David de Villiers Graaff. Whichever way you look at it, there is a rather close family relationship between Lord/ Sir John Henry de Villiers and Sir David de Villiers Graaff. An interesting story of a giant man and a fascinating industry.

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SPECIAL MESSAGE TO THE PRESIDENT OF THE UNITED STATES OF AMERICA JOE BIDEN ON NATIONAL SECURITY OF CANADA, UK, NATO, ISRAEL, INDIA, JAPAN, SOUTH KOREA, AUSTRALIA AND NEW ZEALAND

Dear Mr. President,

The invention of hypersonic missiles by the perceived enemies of the United States would be a huge national security concern. The speed with which they are delivered will wreak havoc resulting in breaking the constitutional order of the United States which it had cherished for two centuries. The attack on the U.S. satellite communication facilities in space could be the first strike option against the U.S. It could cut off the President of the U.S from the Nation, from the Military Commanders and the civil government as a result you will not be able to communicate with U.S allies viz., Canada, UK, Europe/ NATO, Israel, Japan, South Korea, India, Australia, New Zealand, and elsewhere. Your position as Commander-In-Chief of the U.S forces would be meaningless if you are unable to communicate with the Nation. The key allies of the U.S., would lose confidence in your ability to wage a coordinated battle against the perceived enemies. The authoritarian regimes in the World would feel triumphant and forge new strategic alliances.

We, KC – The King's Counsel Magazine, call upon you to immediately appoint a Presidential Commission to inquire into the efficacy of the U.S constitution and whether it should be suitably revised or amended to deal with the new threats. This will ensure that the security of the strategic allies of the U.S too is guaranteed in case such an eventuality takes place.

OVER TO YOU MR. PRESIDENT

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